IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07/04/2003

CORAM

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

Second Appeal No.1925 of 1991

1. Arumugam
2. Kamalammal .... Appellants

-Vs-

Sundarammal ..... Respondent

Second appeal under Section 100 C.P.C. against the Judgment and Decree dated 30.9.1991 made in A.S. No.137 of 1991 on the file of the Principal Subordinate Judge, Cuddalore reversing the judgment and decree dated 15.6.1990 made in O.S. No.429 of 1987 passed by the District Munsif, Cuddalore.

!For Appellants : Mr.v.Raghavachari

^For Respondent : Mr.Kannan for
Mr.V.Ramesh

:JUDGMENT

Defendants 2 and 3 are the appellants.

2. The respondent herein filed the suit in O.S.No.429 of 1987 for declaration declaring her possessory title to the suit property and for consequential injunction with the alternative prayer for recovery of possession which was dismissed. Aggrieved by the judgment and decree, the respondent herein filed A.S.No.137 of 1991 before the Principal Subordinate Court, Cuddalore which was allowed. Hence, the second appeal has been preferred by defendants 2 and 3.

3. Substantial questions of law that were framed in this second appeal are:-

"(1) whether the judgment and decree of the lower appellate court is not contrary to law and runs repugnant to established principles when it has denied the suit for possessory title and recovery of possession especially when the plaintiff is not in possession of the property?

(2) Whether the lower appellate court has not misconstrued the scope and nature of the present suit and it should have seen that the plaintiff has no title to the suit property and its judgment holding that O.S.No.306 of 1988 would operate against the plaintiff therein is palpably unsound and whether its judgment is not highly irregular and in any event liable to be set aside."

4. Learned counsel Mr.V.Raghavachari appearing for the appellants submitted that the vacant land of the suit property belonged to Municipality and the respondent claimed possessory title, as such it is the bounden duty of the first appellate court to determine as to who is in possession of the suit property; that the evidence of PW2 supports the case of the appellants herein that the second appellant herein has been in possession of the suit property; that the court below failed to consider Exs.A8 and A9 which support the case of the second appellant that she has been in possession; that the respondent has not filed any document to prove her possession; that the declaration granted by the first appellate court is based on do documents; that Exs.B15 and B18 stand in the name of the second appellant which are prior to the institution of the suit; that the first appellate court failed to note that the second appellant and Ramalingam lived as husband and wife and the evidence of PW2 substantiates the same; that out of the legal wedlock between the second appellant and the said Ramalingam, children were born; that there is no valid document produced by the respondent to prove her case of title to the suit property vested on her accompanied by possession; that the alleged trespass of the second appellant is not supported by any valid evidence and prayed to set aside the judgment and decree passed by the first appellate court.

5. Learned counsel Mr.Kannan appearing for the respondent submitted that the suit land is a poramboke land and the existing superstructure thereon was put up by the respondent's husband Ramalingam about 35 years ago; that in the front portion of the suit property, the said Ramalingam was running a cycle shop and the rear portion was utilised for his residential purpose; that the respondent, her husband Ramalingam and their three sons were residing in the suit property; that the said Ramalingam died in the year 1981; that the respondent has been in possession and enjoyment of the suit property by paying necessary tax to the concerned authorities; that the second appellant herein has been having illicit intimacy with her husband and she was residing in Alakkudi, Sirkali Taluk and after the demise of the said Ramalingam, the second appellant attempted to interfere with her possession; that the first appellant and the first defendant viz. on Rajendran alleging themselves as tenants under the second appellant herein; that on 16.2.1987, the second appellant herein dismantled the wall of the suit property, immediately she has given a complaint with the local police, but no action was taken, with the result the suit was filed.

6. The respondent herein has marked Exs.A1 to A14, examined herself as PW1 and one Dhanapal and Vaidhyalingam as P.W.s 2 and 3 respectively. The appellants herein marked Exs.B1 to B20 and the second appellant was examined as DW1.

7. The Trial Court, basing on the voters list filed by the second

appellant herein, has come to the conclusion that during the relevant time, the second appellant was in possession and occupation of the suit property. It is also found by the Trial Court that the second appellant and Ramalingam were living as husband and wife; that the second appellant herein filed a suit for bare injunction in O.S.No.306/86 against respondent's sons which was dismissed; that the second appellant paid kist for the suit property under Exs.B15 to B18 and dismissed the suit.

8. The first appellate court considered Ex.A1 death certificate of Ramalingam, Exs.A2 to A4 house tax receipts, Exs.A5 and A6 receipts issued by the Electricity Board, Ex.A7 Ration card wherein the name of Ramalingam is mentioned as head of the family and respondent as his wife, Ex.A8 voters list for the year 1975, Ex.A9 voters list for the year 1983. In the said two documents Exs.A8 and A9, name of the respondent was found. Exs.A10 and A11 are the judgments in O.S.No.306 of 19 86 and A.S.No.134 of 1999 respectively. Ex.A12 and A13 are the decrees in O.S.No.306 of 1986 and A.S.No.134 of 1999. In the judgment in A.S.No.134 of 1999, the plea of the second appellant that she was in possession of the suit property was rejected by the first appellate court. Ex.A14 is the voters list for the year 1988 relating to Ward No.31 of Cuddalore Municipality. Exs.B1 to B12 receipts issued by the Electricity Board for consumption in the name of Ramalingam. Exs.B13 to B18 kist receipts issued in the name of Ramalingam. Ex.B19 is the voters list wherein the name of the second appellant is found. Ex.B20 is the intimation relating to death ceremony of Ramalingam which contained the second appellant's name. Considering the oral and documentary evidence, the first appellant court has come to the conclusion that the second appellant is not the legally wedded wife of the deceased Ramalingam. To arrive at such a conclusion, the first appellate court relied on the judgment and decree passed in O.S.No.306 of 198 6 filed by the second appellant which was dismissed on the ground that the marriage between the second appellant and the said Ramalingam is invalid.

9. The deposition of witnesses establishe that the second appellant herein was living at Alakkudi village, Sirkali Taluk and not in the suit property. The respondent was residing with Ramalingam in one portion of the suit property till his life time and continued her possession even after the demise of her husband. The first appellate court pointed out the evidence of the second appellant that the sons of the respondent used to frequently visit the suit property and found that she was in possession of the suit property. Moreover, the court is concerned with right to possession and not with possession. The law of inheritance refers to a right to possession and not necessarily actual or physical possession. However, the respondent has proved her possession also. Hence, the declaration granted by the first appellate court in favour of the respondent herein is sustainable in law. Hence, the first substantial question of law is answered against the appellants herein.

10. The first appellate court further found that the second appellant was not in actual possession of the suit property after the death of the said Ramalingam, later she has executed an agreement in favour of the first appellant herein and the first defendant viz., Rajendran with the result defendants 1 and 2 were in possession. The first appellate court further arrived at a decision that the alleged agreement executed by the second

appellant in favour of the first appellant herein and Rajendran is untenable as she has no right whatsoever in the suit property. The first appellate court further found that no agreement was produced by the appellants and the said Rajendran to prove their possession is legal and has rightly concluded that their possession is illegal. Ultimately, the first appellate court rightly granted the relief of declaration and recovery of possession by setting aside the judgment and decree passed by the Trial Court since the property was in possession of the husband of the respondent herein and tax and other charges were paid by him till his life time and after his demise she succeeded to his estate. The reason assigned by the first appellate court for setting aside the judgment and decree of the Trial Court is based on proper consideration of oral and documentary evidence let in by the parties.

11. The judgment and decree passed in O.S.No.306 of 1986 holding that the second appellant herein was not in possession of the suit property was confirmed by the first appellate court in A.S.No.134 of 198 9 and no appeal has been preferred by the second appellant. The first appellate court has rightly found that the judgment in O.S. No. 306 of 1986 would operate against the second appellant herein since it reached finality. Hence, the second substantial question of law is also answered against the appellants.

12. In the result, the second appeal fails and the same is dismissed. No costs.

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Index: Yes
Internet: Yes